(1)

Supreme Court, U.S.
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No.

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In The
Supreme Court of the United States

Rudolph Vegliante, Jr.,
Petitioner
v.
State of New Jersey, Department of Treasury,
Division of Taxation

On Petition For Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR WRIT OF CERTIORARI

Brett J. Riegel, Esq.
Counsel of Record
Amori & Riegel, LLC
717 Sarah St.
Stroudsburg PA 18360
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48 pp

Questions Presented for Review

In the course of his bankruptcy proceeding, Vegliante filed an Adversary Complaint to determine the dischargeability of a tax debt allegedly owed to New Jersey. Vegliante claims that the taxes owed to New Jersey are outside the statutory priority period and may be discharged. The lower courts determined that the truth of Vegliante's assertion cannot be addressed for lack of jurisdiction. In appealing those decisions, Vegliante desires to prevent a collection action against him for a debt that was dischargeable through his bankruptcy proceeding.

1. Did the lower courts err in dismissing the adversary complaint where the failure to exercise jurisdiction leaves Vegliante without recourse?

Suggested Answer: Yes.

2. Should the holding of this Court in Seminole Tribe of Florida v. Florida be reviewed and modified to allow a forum to resolve the federal question issue of dischargeability where a state is a party?

Suggested Answer: Yes.

3. Did the lower courts err in dismissing the adversary complaint where the dischargeability of the disputed debt cannot be determined without discovery and a hearing?

Suggested Answer: Yes.

Parties to the Proceeding
Petitioner:
Rudolph Vegliante, Jr.

Respondent:
State of New Jersey, Department of Treasury, Division of Taxation

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Statement of Jurisdiction

The Judgment of the United States Court of Appeals for the Third Circuit was entered on July 30, 2002. This Court has jurisdiction to hear the issues presented pursuant to 28 U.S.C. § 1254.

Constitutional and Statutory Provisions

U.S. Const. Art. I § 8(4)

The Congress shall have Power ... to establish ... uniform Laws on the subject of Bankruptcies throughout the United States.

U.S. Const. amend. 11

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

11 U.S.C. § 106(c)

Notwithstanding any assertion of sovereign immunity by a governmental unit, there shall be offset against a claim or interest of a governmental unit any claim against such governmental unit that is property of the estate.

11 U.S.C. § 507 Priorities.

(a) The following expenses and claims have priority in the following order:

...

(8) Eight, allowed unsecured claims of governmental units, only to the extent that such claims are for –

(A) a tax on or measured by gross income or receipts –

(i) for a taxable year ending on or before the date of the filing of the petition for which a return, if required, is last due, including extensions, after three years before the date of the filing of the petition;

...

(C) a tax required to be collected or withheld and for which the debtor is liable in whatever capacity;

11 U.S.C. § 523 Exceptions to discharge.

(a) A discharge under section 727... of this title does not discharge an individual from any debt –

(1) for a tax or a customs duty –

(A) of the kind and for the periods specified in section 507(a)(2) or 507(a)(8) of this title, whether or not a claim for such tax was filed or allowed;

(B) with respect to which a return, if required –

(i) was not filed; or

(ii) was filed after the date on which such return was last due, under applicable law or under any extension, and after two years before the date of the filing of the petition; or

(C) with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax.

Statement Of The Case

On February 8, 2000, Petitioner, Vegliante, filed a Voluntary Petition under Chapter 7 with the United States Bankruptcy Court for the Middle District of Pennsylvania. Respondent, New Jersey, was listed as an unsecured creditor on Schedule F of the Petition in the amount of $210,048.32.

Vegliante initiated an adversary proceeding on June 23, 2000 to determine the dischargeability of the tax debt claimed by New Jersey, as Vegliante contends the debt falls outside the statutory period regulating dischargeability. Vegliante's discharge was entered on July 11, 2000.

New Jersey filed a motion to dismiss the adversary proceeding on August 14, 2000, alleging that the bankruptcy court lacked jurisdiction. The bankruptcy court granted the motion to dismiss by opinion and order entered April 12, 2001. Vegliante filed a timely appeal to the United States District Court for the Middle District of Pennsylvania. The district court denied Vegliante's appeal by Memorandum and Order dated September 14, 2001. Vegliante filed a timely appeal to the United States Circuit Court of Appeals. Following oral argument, the circuit court denied the appeal by order entered on the record on July 30, 2002.

Reasons Relied on for Allowance of the Writ

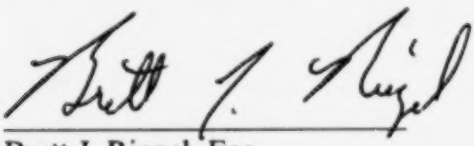
Vegliante requests that this Court review and clarify or amend the holding of its decision in Seminole Tribe of Florida v. Florida, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996) to allow a federal forum to resolve bankruptcy issues where a state is a party. Currently, in the wake of the Seminole decision, the lower courts are divided in their decisions whether state creditors are to be treated like any other creditor in a bankruptcy case. Some courts, like the courts below in the instant case, have determined that the federal courts lack jurisdiction to hear issues raised by a bankruptcy debtor against a state creditor. See e.g., Sacred Heart Hospital of Norristown v. Pennsylvania Dept. of Public Welfare, 133 F.3d 237 (1998) (no jurisdiction to determine whether state agency owes Debtor money); In re Mitchell, 209 F.3d 1111 (9th Cir. 2000) (no jurisdiction to determine dischargeability of tax debt); In re Taylor, 249 B.R. 571 (Bankr. N.D. Ga. 2000) (same). At least one court has followed the holding of Seminole while clearly expressing its disagreement with controlling authority. In re Lankford, 260 B.R. 410 (N.D. Tex. 2001).

Other courts have determined that those portions of the Seminole decision touching on the issue of bankruptcy are mere dicta. In so doing, these courts have determined that the states ceded sovereign immunity over the subject of bankruptcy at the time of the drafting of the United States Constitution. See, e.g., In re Bliemeister, 251 B.R. 383 (Bankr.D.Ariz. 2000), aff'd on other grounds, 296 F.3d 858 (9th Cir. 2002); In re Hood, 262 B.R. 412 (BAP 6th Cir. 2001).

The precedent set in Seminole prevents Congress from exercising its Article I plenary powers where a state is a party unless due process is implicated. Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank, 527 U.S. 627, 119 S.Ct. 2199, 144 L.Ed.2d 575 (1999). The reasoning in this line of cases not only contradicts the purpose of the bankruptcy process, but also has led to judicial inefficiency. Because, under Seminole, the dischargeability of tax debts cannot be determined without a waiver of sovereign immunity,

debtors who have received a discharge may be subject to collection actions by states or state agencies who have not allowed their claims to be determined through the bankruptcy process. Denying Debtors the opportunity to establish the extent of the debts to be discharged before the discharge is entered leaves the Debtor under a veil of uncertainty, knowing that the state may move to collect the undetermined debt at any time. Such uncertainty and potential costs are contrary to the purpose of the bankruptcy system, which is to grant "the honest but unfortunate debtor … a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt." Local Loan Co. v. Hunt, 292 U.S. 234, 244, 54 S.Ct. 695, 78 L.Ed.2d 1230 (1934). Unless Debtors are allowed to determine the dischargeability of all their debts prior to discharge, the new opportunity promised under Article I is tarnished with uncertainty and the lurking potential of more debt.

Respectfully submitted,



Brett J. Riegel, Esq.
Attorney for Petitioner, Rudolph Vegliante, Jr.
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Appendix

1. Adversary Complaint to Determine Dischargeability
2. Motion to Dismiss Adversary Complaint
3. Bankruptcy Court Opinion and Order
4. Notice of Appeal from the Bankruptcy Court's Decision
5. District Court Memorandum and Order
6. Docket Entries from the District Court
7. Notice of Appeal from the District Court's Decision
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IN THE BANKRUPTCY COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA NORTHERN DIVISION

IN RE: Rudolph Vegliante, Jr. 5-00-000392

Rudolph Vegliante, Jr.
Plaintiff — Adversary Complaint

v. — 5-00-00139A

State of New Jersey, Dept. of Treasury,
Divisions of Revenue and Taxation
Defendant

Adversary Complaint to Determine Dischargeability of a Debt

1. Plaintiff in this matter is Debtor Rudolph Vegliante, Jr. of 151 Leisure Lands, East Stroudsburg, PA 18301.

2. The Defendant in this matter is the State of New Jersey, Department of the Treasury at P.O. Box 002, Trenton, NJ 08625-0002.

3. On February 8, 2000 the Plaintiff. Debtor commenced a voluntary case under Chapter 7 of the bankruptcy Code by filing a Petition, which was assigned No. 5-00-00392 in this Court.

4. The Court has jurisdiction to hear this matter under 28 U.S.C. §1334 and 11 U.S.C. §§727 and 523, since it arises in

that case and is related to it. This proceeding is a core proceeding.

COUNT I-Dischargeability of Tax Debt

5. Plaintiff incorporates the preceding paragraphs by reference.

6. The Defendant, was named in Schedule F, as creditor Nos. 9 and 28, of the Petition as a creditor without security or priority.

7. The obligations at issue are tax debts from fiscal years 1995 and 1996.

8. The address listed in the schedule are accurate. The account numbers are accurate.

9. Under 11 U.S.C. §507(a)(8), these taxes are outside the statutory priority period and may be discharged.

10. Debtor seeks an order confirming the dischargeability of these tax debts.

WHEREFORE, Debtor respectfully requests that the Court enter an order granting him a discharge as to the tax obligation referenced in this Complaint.

Date: 6/21/00

/s/ Brett J. Riegel, Esq.

Attorney for Plaintiff/Debtor
Amori & Riegel, LLC
717 Sarah Street
Stroudsburg, PA 18360
Atty ID 76448
717-421-1260
717-421-1407 fax

CERTIFICATE OF SERVICE
CASE NO. 5-00-000392

I, Adrienne Amori-Smith of Amori & Riegel, LLC certify:

That I am, and at all times hereinafter mentioned was, more than 18 years of age.

That on the 22nd day of June, 2000, I served a copy of the within Adversary Complaint filed in this proceeding, on

Department of the Treasury
Trenton, NJ 08625-0002

Division Of Taxation
Trenton, NJ 08646

Division of Revenue
Trenton, NJ 08625-0002

Office of the Attorney General
Trenton, NJ 08625-0080

respondents in this proceeding, by (describe here the mode of service)

FIRST CLASS MAIL

Respondents at

James DiEleuterio, State Treasurer
Department of the Treasury
P.O. Box 002
Trenton, NJ 08625-0002

Richard D. Gardiner, Director
Division of taxation
50 Barrack Street
P.O. Box 269
Trenton, NJ 08646

Patricia Chiacchio, Director
Division of Revenue
P.O. Box 002
Trenton, NJ 08625-0002

Peter G. Verniero, Attorney General
Office of the Attorney General
P.O. Box 080
Trenton, NJ 08625-0080

I certify under penalty of perjury that the foregoing is true and correct.

Executed on June 22, 2000 /s/ Adrienne Amori-Smith
Date Signature
Amori & Riegel, LLC
717 Sarah Street
Stroudsburg, PA 18360

(Date) (Signature)

JOHN J. FARMER, JR.
Attorney General of New Jersey
R.J. Hughes Justice Complex
25 Market Street
P.O. Box 106
Trenton, New Jersey 08625
Attorney for the State of New Jersey, Division of Taxation

By: Tracy E, Richardson (TR1366)
Deputy Attorney General
(609) 777-3437

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

In re:	Chapter 7
RUDOLPH VEGLIANTE, JR., Debtor.	Case No. 5-00-00392
RUDOLPH VEGLIANTE, JR. Plaintiff, v. STATE OF NEW JERSEY, DEPARTMENT OF TREASURY, Defendant.	Adv. no. 5-00-00139A

DEFENDANT'S NOTICE OF MOTION TO DISMISS
ADVERSARY COMPLAINT
FOR LACK OF JURISDICTION

TO: Clerk
United States Bankruptcy Court
Middle District of Pennsylvania
274 Max Rosenn U.S. Courthouse
197 South Main Street
Wilkes-Barre, Pennsylvania 18701

Brett J. Riegel, Esq.
Amori & Riegel, LLC
717 Sarah St.
Stroudsburg PA 18360

PLEASE TAKE NOTICE, that on , 2000 at , or as soon thereafter as counsel may be heard, the undersigned attorney for Defendant, State of New Jersey, Division of Taxation, will apply for the entry of an Order Dismissing the Adversary Complaint for Lack of Jurisdiction.

PLEASE TAKE FURTHER NOTICE, that in support of the relief requested, the Defendant shall rely on the accompanying Memorandum of Law.

PLEASE TAKE FURTHER NOTICE, that the Defendant hereby requests oral argument on this matter.

JOHN J. FARMER, JR
Attorney General of New Jersey

By: /s/ Tracy E. Richardson
Tracey E. Richardson
Dated: 8/14/00 Deputy Attorney General

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

IN RE: CHAPTER SEVEN

RUDOLPH VEGLIANTE, JR., BANKRUPTCY
NO. 5-00-00392
DEBTOR
RUDOLPH VEGLIANTE, JR.,
PLAINTIFF

Nature of Proceeding

vs. Defendant's Motion to Dismiss Adversary Complaint for Lack of Jurisdiction

STATE OF NEW JERSEY, DEPT. OF TREASURY, DIVISIONS OF REVENUE and TAXATION,
DEFENDANT ADVERSARY
NO. 5-00-00139A

OPINION[1]

The issue in this case is whether this Court can entertain the adversary proceeding before it. In short, no.

On February 8, 2000. Rudolph Vegliante, Jr., the Plaintiff/Debtor, filed a Voluntary Petition under Chapter 7 with this Court. The Plaintiff listed the State of New Jersey, Department of Treasury, Division of Revenue and Taxation, the Defendant, as unsecured creditor number nine (9) on Schedule F in the amount of $210, 048.32. (Doc. #1 filed to case docket 5-00-00392.) This adversary proceeding was commenced by the Plaintiff on June 23, 2000. (Doc. #9 filed to case docket 5-00-00392.) The discharge of the Debtor was entered on July 11, 2000. In the Complaint, Plaintiff alleged that the debts in question were tax obligations to the Defendant State of New Jersey, Department of Treasury for 1995 and 1996. (See Complaint

filed to adversary 5-00-00139A.)

On July 27, 2000, Defendant filed Notice of Appearance and Request for Service of Papers and Other Documents which explicitly stated that, " nothing in this pleading is intended to waive the state of New Jersey's or its officials' immunity from suit in a federal court under the Eleventh Amendment." (Notice of Appearance and Request for Service of Papers and Other Documents, Doc. #4A.) This was followed, on August 15, 2000, with the Defendant's Motion to Dismiss the Adversary Complaint for Lack of Jurisdiction. (Doc. #5A.)

Plaintiff argues that these tax debts are dischargeable because they are outside the statutory period allowed under 11 U.S.C. §507(a)(8). (See Complaint at 2.) Plaintiff admits that without further discovery or a hearing on the merits, this Court cannot make a determination on the dischargeability of the debts. (Plaintiff's Memorandum of Law in Opposition to Defendant's Motion to Dismiss the adversary Complaint (Doc. #11A) at fourth page. Defendant asserted the defense of sovereign immunity under the 11th Amendment of the Constitution, and argued that this Court cannot hear the case. Defendant further argued that even if this Court can exercise jurisdiction, the tax debts are not dischargeable because they fall under 11 U.S.C. 507 (a)(8)(C). This Court cannot address the merits of the dischargeability of the debts if it cannot assert jurisdiction in this matter. Thus, the threshold issue is whether this Court can hear this case. I conclude that I cannot hear the merits of this case because the Defendant has properly invoked its sovereign immunity.

States retain their immunity through the 11th amendment to the Constitution of the United States which states,

"The Judicial Power if the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. Amend. XI.

Thus, states are immune from suits brought by individuals from other states and by their own citizens. *Edelman v. Jordan*, 415 U.S. 651, 662-62; 94 S.Ct. 1347, 1355, 39 L.Ed.2d 662 (974) (collecting cases) [hereinafter Edelman], as discussed in *In re Sacred Heart Hospital of Norristown*, 133 F.3d 237, 241 (3rd Cir. 1998)[hereinafter *In re Sacred Heart*]

The first determination the Court must make is whether the Plaintiff has brought a suit. If there was a "suit", then this Court would be precluded from adjudicating it because the Defendant has asserted its sovereign immunity from this suit. As far back as 1821, the Supreme Court held that a suit requires: (1) an adversarial proceeding; (2) which arises as a result of a deprivation or injury; (3) which involves at least two parties; (4) which compels the attendance of one of the parties; (5) which asserts and prosecutes a claim against one of the parties; and (6) which demands the restoration of some thing from the defending party. *Cohens v. Virginia*, 6 Wheat. 264, 19 U.S. 264, 5 L.Ed. 257 (1821). Recently, bankruptcy courts have used this analysis concerning an individual plaintiff seeking a declaratory judgment on the dischargeability of a debt to a state, where the statue then invokes its sovereign immunity. *In re Taylor*, 249 B.R. 571 (Bankr. N.D.Ga. 2000)(adversary proceeding qualified as a "suit" against state, within meaning of Eleventh Amendment); Barrett Refining Corp., 221 B.R. 795, 803 (Bankr. W.D. Okla. 1998)(distinguishing a bankruptcy case from an adversary proceeding); see also, In re Mueller, 211 B.R. 737 (Bkrtcy. D.Mont 1997)(an action determining personal liability for a corporate debt constitutes a suit). The Debtor is requesting a judgment declaring certain tax debts dischargeable. Debtor filed an adversary proceeding (Doc. #1A) and caused a Summons to be served on the Defendant on or about June 23, 2000 (Doc. #2A). This Summons required the response of the Defendant, otherwise there may be a default judgment entered against it. Id. Thus, the Defendant was compelled to respond. Such an adversary proceeding as this meets the requirements of a suit for Eleventh Amendment purposes.

In the wake of the Supreme Court's landmark decision in *Seminole*, federal courts have held that hey do not have the legal authority to entertain adversary proceedings by an individual against a State that has not waived its immunity. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996). See also, *Alden v. Maine*, 527 U.S. 706, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999); In *re Sacred Heart, supra.*; *In re Creative Goldsmith of Washington D.C.*, 119 F.3d 1140 (4th Cir. 1997); *In re Doiel*, 228 B.R. 439 (D.S.D. 1998). The reason is that the Supreme Court in *Seminole* held that Congress may not abrogate state sovereign immunity by passing legislation pursuant to its Article I powers. 517 U.S. at 71-74, 116 S.Ct. at 1131-32. More directly on point, the Third Circuit, following the Supreme Court's reasoning in *Seminole*, held in *Sacred Heart* that Congress' attempt to abrogate state sovereign immunity as to numerous sections of the Bankruptcy Code by enacting section 106 in 1994 was unconstitutional. *In re Sacred heart*, supra at 245.

The Eleventh Amendment is abrogated by Congress if (1) it does so intentionally, and (2) it does so pursuant to a Constitutional provision allowing it to do so. *Green v. Mansour*, 474 U.S. 64, 68, 106 S.Ct. 423, 425-26, 88 L.Ed.2d 371 (1985); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 98, 104 S.Ct. 900, 906, 79 L.Ed.2d 67 (1984) [hereinafter Pennhurst]; *In re Sacred Heart, supra.* at 242. After *Seminole*, Eleventh Amendment sovereign immunity will typically only be abrogated by Congress acting through the Fourteenth Amendment's enforcement clause, section 5. This allows Congress to at in remedial way to protect the life, liberty, or property of an individual. Bankruptcy is not one of these fundamental rights. *United States v. Kras*, 409 U.S. 434, 93 S.Ct. 631, 34 L.Ed.2d 626 (1973). Congress, therefore, did not properly abrogate state sovereign immunity under the Eleventh Amendment when it enacted Section 106 of the Bankruptcy Code. *Seminole, Sacred Heart, supra.* Since Congress did not abrogate state sovereign immunity, a state is immune from suits brought by individuals from other states and by its own citizens,

unless the state consents to the suit. *Alden v. Maine, supra.*; *Edelman. supra.*; *In re Sacred Heart, supra.*

In addition, Plaintiff has argued that since he seeks declaratory rather than monetary relief, this Court should be able to reach a decision on the merits of this case. (Plaintiff's memorandum of Law (Doc. #11A) at second page. Plaintiff bases his argument on the Supreme Court's ruling in *United States v. Nordic Village, Inc.*, 503 U.S. 30 (1992), and *Hoffman, Trustee v. Connecticut Department of Income Maintenance*, 492 U.S. 96 (1989). Both Nordic *Village* and *Hoffman* are concerned with Section 106(c) of the Bankruptcy Code prior to tits amendment in 1994 which dealt with offset. Plaintiff's argument is misplaced as the matter before this Court does not deal with the issue of offset. Moreover, "the type of relief sought is irrelevant" for purposes of the eleventh Amendment. In re Kish, 212 B.R. 808, 814 (D.N.J. 1997), *citing Pennhurst*, 465 U.S. 89, 100-01, 104 S.Ct.900, 908, 79 L.Ed.2d 67 (1984) ("jurisdictional bar [of the Eleventh Amendment] applies regardless of the relief sought"), *Cory v. White*, 457 U.S. 85, 102 S.Ct. 2325, 72 L.Ed.2d 694 (1982) ("It would be a novel proposition indeed that the Eleventh Amendment dose not bar a suit to enjoin the state itself simply because no money judgment is sought."), and *In re Sacred Heart*, 133 F.3d at 139.

Injunctive relief against a state is permissible under *Ex Parte Young* in order to remedy a state officer's ongoing violation of federal law. *Ex Parte Young*, 209 U.S. 123 (1908); *Seminole* at n. 14. Here, there is no claim or action brought by the Defendant, or agent of the Defendant, to collect the debts owed by the Plaintiff. Nor has the Plaintiff claimed such action by the Defendant. Therefore, Plaintiff's argument is not applicable.

An adversary proceeding under the Federal Rules of bankruptcy Procedure includes "a proceeding to determine the dischargeability of a debt." Federal Rule of Bankruptcy Procedure 7001(6). Plaintiff brought this adversary proceeding against Defendant in accordance with Federal Rule of bankruptcy Procedure Rule 7003 (commencement of an adversary pro

ceeding), and rule 7004 (Process; Service of Summons, Complaint). As discussed earlier, this adversary proceeding is a "suit", for purposes of the Eleventh Amendment. Defendant did not waive its sovereign immunity such as filing a proof of claim against the Debtor/Plaintiff in his bankruptcy proceeding or in some other manner. Furthermore, Defendant's notice of appearance and memorandum of law specifically do not waive Defendant's sovereign immunity. See, Notice of Appearance and request for Service papers and Other Documents 9Doc. #4A at 3) ("Accordingly, nothing in this pleading is intended to waive the State of New Jersey's or its officials' immunity from suit in federal court under the eleventh Amendment."); The State of New Jersey, Division of taxation's Memorandum of Law in Support of Motion to Dismiss Plaintiff's Complaint (Doc, #6A). Given the facts of this case and the above discussion on sovereign immunity, this Court has no jurisdictional basis to hear this matter.

For these reasons, this Court finds that it cannot reach the question of whether the debts in question are dischargeable because it lacks jurisdiction.

An Order will follow

BY THE COURT

/s/ John J. Thomas
/s/ JOHN J. THOMAS
United States Bankruptcy Judge

WILKES-BARRE, PENNSYLVANIA

DATED: April 12, 2001

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

IN RE: CHAPTER SEVEN

RUDOLPH VEGLIANTE, JR., BANKRUPTCY
NO.: 5-00-00392

DEBTOR

RUDOLPH VEGLIANTE, JR.,
PLAINTIFF

Nature of Proceeding

vs. Defendant's Motion to Dismiss Adversary Complaint for Lack of Jurisdiction

STATE OF NEW JERSEY, DEPT. OF TREASURY, DIVISIONS OF REVENUE and TAXATION,
DEFENDANT ADVERSARY
NO. 5-00-00139A

ORDER

For those reasons indicated in the Opinion filed this date, the Defendant's Motion to Dismiss Adversary Complaint for Lack or jurisdiction is granted.

Dated, at Wilkes-Barre, PA, this 12th day of April, 2001.

BY THE COURT
/s/ JOHN J. THOMAS
United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

IN RE:

RUDOLPH VEGLIANTE, JR.,
CHAPTER SEVEN
DEBTOR

RUDOLPH VEGLIANTE, JR.,
PLAINTIFF
BANKRUPTCY NO.
5-00-00392

vs.

ADVERSARY NO.
5-00-00139A
STATE OF NEW JERSEY, DEPT. OF
TREASURY, DIVISION OF
REVENUE and TAXATION,
DEFENDANT

NOTICE OF APPEAL

Rudolph Vegliante, Jr., the plaintiff, appeals under 28 U.S.C. §185(a) from the order of the bankruptcy judge entered in this adversary proceeding on the 12th day of April, 2001.

The names of all parties to the order appealed from and the names, addresses, and telephone numbers of their respective attorneys is as follows:

for Plaintiff, Rudolph Vegliante, Jr.

Plaintiff/Appellant:

Brett J. Riegel, Esq.

Amori & Riegel, LLC

717 Sarah Street

Stroudsburg, PA 18360

(570) 421-1260

for State of New Jersey, Dept. of Treasury, Divisions of Revenue and Taxation

Defendant/Appellee:

Tracy E. Richardson,

Deputy Attorney General

RJ Hughes Justice Complex

25 Market Street

P.O. Box 106

Trenton, NJ 08625

(609) 777-3437

Dated: 4/16/02

Signed: Brett J. Riegel

Attorney for Appellant

Brett J. Riegel, Esq.

Amori & Riegel, LLC

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Stroudsburg, PA 18360

(570) 421-1260

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

IN RE:

RUDOLPH VEGLIANTE, JR.,
Plaintiff/Appellant

No. 3:01cv0788
v. **(Judge Munley)**

STATE OF NEW JERSEY, DEPARTMENT OF TREASURY, DIVISION OF TAXATION,
Defendant/Appellee

MEMORANDUM

Before the court for disposition is an appeal from the bankruptcy Court which requires us to determine whether that court properly declined to exercise jurisdiction over the State of New Jersey in this case. The appellant/debtor of the bankruptcy is Rudolph Vegliante, Jr., (hereinafter "Debtor") and the appellee is the State of New Jersey. The matter is ripe for disposition having been fully briefed and argued by the parties. For the reasons that follow, the court will affirm the Bankruptcy Court's decision that it lacked the power to exercise jurisdiction over the State of New Jersey pursuant to the Eleventh Amendment of the United States Constitution. In re Vegliante, 261 B.R. 817 (Bankr. M.D. Pa. 2001).

Jurisdiction

We have jurisdiction over bankruptcy appeals pursuant to 28 U.S.C. §158 (a)(1) which provides that the District Courts

of the United States have jurisdiction to hear appeals from final judgments, orders, and decrees of the Bankruptcy Courts.

Background

The Debtor filed a voluntary bankruptcy petition under Chapter 7 of the United States Bankruptcy Code on February 8, 2000. In this petition, Debtor listed New Jersey as an unsecured creditor. Debtor owes New Jersey tax debts from the fiscal year 1995 to 1996. On June 23, 2000, Debtor filed an adversary Complaint to determine the dischargeability of the tax debts owed to New Jersey. The Bankruptcy Court entered the Debtor's discharge on July 11, 2000.

On July 27, 2000, New Jersey filed a Notice of Appearance and request for Service of Papers and Other Documents, explicitly reserving its immunity from suit in federal court under the Eleventh Amendment. New Jersey then filed a Motion to Dismiss Debtor's Complaint for lack of jurisdiction, which the Bankruptcy Court granted on April 12, 2001. The Bankruptcy Court found that the Eleventh Amendment barred its exercise of jurisdiction over the State of New Jersey and refused to reach the merits of the dischargeability of Debtor's tax debts owed to that state. Debtor now appeals that decision and the Bankruptcy Court's subsequent to deny debtor's request for stay pending appeal.

Standard of Review

This court reviews the Bankruptcy Court's conclusions of law de novo. In re O'Brien Envtl Energy, Inc. 188 F.3d 116 122 (3d Cir. 1999). The Bankruptcy Court's findings of fact will only be set aside if clearly erroneous. Bank. Rule 8013.

Discussion

New Jersey contends that the Eleventh Amendment bars the exercise of federal court jurisdiction over this matter. The Eleventh Amendment states:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another state, or

by Citizens or Subjects of any Foreign State.

U.S. CONST. amend. XI. The plain text of the Eleventh Amendment bars only suits against states brought by citizens of other states or foreign citizens or subjects. Edelman v. Jordan, 415 U.S. 651, 662-63; Hans v. Louisiana, 134 U.S. 1 (1890). Although fundamental to American federalism, the sovereign immunity if the states form suits brought by individuals is not absolute. Alden v. Maine, 527 U.S. 706, 755-56 (1999).

Private parties may sue states if either of two conditions are met. First, a state may consent to suit, thereby waiving its immunity. Id. Second, Congress may, through the exercise of its section 5 enforcement powers under the Fourteenth Amendment, abrogate state sovereign immunity. Id. But, without either consent to suit or the abrogation of sovereign immunity by Congress, the eleventh Amendment bars the exercise of federal court jurisdiction over a state in a suit brought by a private party. Id.

In this matter, New Jersey has not consented to suit and Congress has not lawfully abrogated its sovereign immunity. In answering Debtor's original Complaint in Bankruptcy Court, New Jersey entered a special appearance where it explicitly reserved its sovereign immunity. New Jersey has done the same in connection with this appeal. Consequently, New Jersey has not consented to suit in this matter.

In this proceeding, New Jersey has not consented to suit in federal court, therefore, we must determine whether Congress has abrogated New Jersey's sovereign immunity. Debtor argues that although New Jersey has not consented to suit this matter, the Bankruptcy Court still has jurisdiction over that state by virtue of Congress's enactment of section 106 of the Bankruptcy Code. 11 U.S.C.A. §106 (West Supp. 2001) (hereinafter "Code"). We disagree with Debtor's argument.

The text of section 106(a) of the Bankruptcy Code appears to abrogate the sovereign immunity of the states in relation to various sections of the Code. See In re Sacred Heart

Hosp., 133 F.3d 237 (3d Cir. 1998) (discussing section 106(a) of the Code). Nonetheless, the Supreme Court has ruled that Congress lacks the power to abrogate state sovereign immunity through legislation passed pursuant to its Article I powers. Seminole Tribe of Florida v. Florida, 517 U.S. 44, 71-74 (1996). Two years after the Court's decision in Seminole, the United States Court of Appeals for the Third Circuit considered the constitutionally of section 106(a) of the Code in Sacred Heart. The Third Circuit concluded in Sacred Heart that Congress passed section 106(a) pursuant to the Bankruptcy Clause of Article I. Sacred Heart, 133 F.3d at 245. It ruled, therefore, in accordance with the Seminole decision, that section 106(a) was an unconstitutional attempt at the abrogation of state sovereign immunity by Congress through its Article I powers. Id.

This court is bound by both the Seminole and Sacred Heart precedents. Consequently, we conclude that New Jersey's sovereign immunity has not been abrogated in this matter by Congress's passage and the subsequent enactment of section 106(a) of the Bankruptcy Code. We therefore will affirm the decision of the bankruptcy Code to decline the exercise of federal jurisdiction over New Jersey in this case.

Recognizing the bar posed by the Eleventh Amendment to the exercise of federal jurisdiction in this dispute, Debtor argues for the application of the Ex Parte Young exception. Ex Parte Young, 209 U.S. 123 (1908). The Ex Parte Young exception to Eleventh Amendment immunity permits the exercise of federal court jurisdiction to order prospective injunctive relief against a state official for continuing violations of federal law. Green v. Mansour, 474 U.S. 64, 68 (1985). In this case, the Bankruptcy Court rejected the application of the Ex Parte Young exception because the Debtor alleged no continuing violation of federal law. Vegliante, 261 B.R. at 821. We agree with the Bankruptcy Court and conclude that the Ex Parte Young exception to Eleventh Amendment immunity is not applicable here.

Finally, Debtor also sought a stay pending appeal of this matter. Given the above discussion and the conclusion that we, like the Bankruptcy Court, lack jurisdiction over this matter.

Debtor's request for a stay will be denied.

Conclusion

For the reasons discussed above, we find that the Bankruptcy Court properly concluded that it had no jurisdiction over New Jersey in this matter. Therefore, we will affirm its decision not to reach the merits of the case and we will deny the bankruptcy appeal. For the same reasons, we will also deny Debtor's request for a stay. An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

IN RE:

RUDOLPH VEGLIANTE, JR.,
Plaintiff/Appellant

No. 3:01cv0788

v. **(Judge Munley)**

STATE OF NEW JERSEY, DEPT. OF TREASURY, DIVISION OF TAXATION,
Defendant/Appellee

ORDER

AND NOW, to wit, this 14th day of September, 2001, it is hereby **ORDERED** that:

1) The appellant's request for a stay pending appeal [3-1] is hereby **DENIED**;
2) The appellant's appeal [1-1] is hereby **DENIED**; and
3) The Clerk of Court is directed to close this case.

BY THE COURT:
/s/ James Munley
JUDGE JAMES M. MUNLEY
United States District Court

TERMED APPEAL

SCR BKAPP

U.S. District Court

Middle District of Pennsylvania (Scranton)

CIVIL DOCKET FOR CASE #: 01-CV-788

Vegliante v. NJ Dept. of Treasury Filed: 05/04/01

Assigned to : Judge James M. Munley

Demand: $0,000 42089 Nature of Suit: 422

Lead Docket: None Jurisdiction: Federal Question

DKT # in USBC-MDPA: is 5:00-139A

DKT # in USBC-MDPA: is 5:00-392

Cause: 28:0158 Notice of Appeal re bankruptcy Matter (BAP)

RUDOLPH VEGLIANTE, JR.
plaintiff

Brett J. Riegel
[COR LD NTC]
717 Sarah Street
Stroudsburg, PA 18360
(570) 421-1260

v.

STATE OF NEW JERSEY, DEPARTMENT OF TREASURY, DIVISIONS OF REVENUE AND TAXATION
defendant

Stephen L. Brandwene
[COR LD NTC]
Chief Deputy
Attorney General
Strawberry Square
15th Floor
Harrisburg, PA 17120
717-787-3646

Tracy E. Richardson
[COR LD NTC]
R.J. Hughes Justice Complex
P.O. Box 106
Trenton, NJ 08625
609-777-3437

TERMED APPEAL
SCR BKAPP

Proceedings include all events.
3:01cv788 Vegliante v. NJ Dept. of Treasury

5/4/01	1	BANKRUPTCY APPEAL (hm) [Entry date 05/08/01]
5/4/01	2	BANKRUPTCY APPEAL LETTER of District Clerk informing parties that an appeal has been docketed in this court on 5/8/01. (cc: Judge, counsel, BK Clerk) (hm) [Entry date 05/08/01]
5/4/01	3	MOTION by plaintiff Rudolph Vegliante Jr. to Stay Pending Appeal with exhibit (hm) [Entry date 05/08/01] [Edit date 05/08/01]
5/4/01	4	Appellant's Brief by plaintiff Rudolph Vegliante Jr. (hm) [Entry date 05/08/01]
5/4/01	--	SPECIAL ADMISSION FORM sent to attorney: Tracy E. Richardson; attorney application due 5/14/01 (hm) [Entry date 05/08/01]
5/14/01	--	ATTORNEY SPECIAL ADMISSION

		form received from: Tracy E. Richardson, Esq. forwarded to Judge Munley for approval. Receipt # 333 83681 Amt.: $25.00 (ao) [Entry date 05/15/01]
5/16/01	5	MOTION by Defendant NJ Dept. of Treasury to extend time to file a brief and an extension to file a response to request for stay pending appeal (ao) [Entry date 05/18/01]
5/16/01	6	BRIEF by Defendant NJ Dept of Treasury IN SUPPORT of motion to extend time to file a brief and an extension to file a response to request for stay pending appeal [5-1] (ao) [Entry date 05/18/01]
5/16/01	7	STATEMENT THAT NO BRIEF IS NECESSARY by Defendant NJ Dept of Treasury in support of motion to extend time to file a brief and an extension to file a response to request for stay pending appeal [5-1] (ao) [Entry date 05/18/01]
5/22/01	8	ORDER by Judge James M. Munley granting motion to extend time to file a brief and an extension to file a response to request for stay pending appeal by 6/20/01 [5-1] (cc: all counsel court) (sm) [Entry date 5/22/01]

5/23/01	9	REQUEST OF ATTORNEY FOR SPECIAL ADMISSION to practice on behalf of NJ Dept of Treasury by Tracy E. Richardson, Esq. approved by court (kn) [Entry date 05/23/01]
6/20/01	10	BRIEF by Defendant NJ Dept of Treasury IN OPPOSITION to motion to Stay Pending Appeal with Exhibit [3-1] and c/s (jw) [Entry date 06/20/01]
6/20/01	11	BRIEF FILED by Defendant NJ Dept of Treasury and c/s (jw) [entry date 06/20/01]

TERMED APPEAL
SCR
Proceeding include all events. BKAPP
3:01cv788 Vegliante v. NJ Dept of Treasury

8/16/01	12	ORDER by Judge James M. Munley THAT: This case is listed for oral argument on Thursday, August 30, 2001 at 11:00 a.m.; In-court hearing 11:00 8/30/01 (cc: all counsel court) (ts) [entry date 08/16/01]
8/21/01	13	Certification of Tray E. Richardson and Designation of Associate Counsel, Stephen Brandwene (hm) [Entry date 08/22/01]
9/12/01	14	MINUTE SHEET of Oral Argument held 8/30/01 before Judge Munley. CTR: None (ao) [Entry date 09/14/01]
9/14/01	15	MEMORANDUM AND ORDER: by Judge James M. Munley denying motion to Stay Pending Appeal [3-1]. Appellant's appeal is DENIED. Clerk to close case. Orig. in Sec. Case terminated (cc: all counsel court) (ao) [entry date 09/14/01]

10/5/01	16	Notice of appeal by plaintiff Rudolph Vegliante Jr. from District Court order filed 9/14/01 [15-2] (Filing fee paid, order being appealed, with info/ack letter to USCA. (cc" cnsl, Ct.) Receipt No. & Amt: 333 85421 (ao) [Entry date 10/09/01]
10/10/01	17	CERTIFICATE of No Transcript by Brett Riegel, attorney for plaintiff Rudolph Vegliante Jr. (hm) [Entry date 10/10/01]
10/10/01	--	DISTRICT COURT RECORD COMPLETE FOR PURPOSES OF APPEAL (hm) [Entry date 10/10/01]
10/10/01	--	Certified copy of docket in lieu of record on appeal transmitted to USCA (hm) [Entry date 10/10/01]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RUDOLPH VEGLIANTE, JR.,
Appellant
vs.

3:01cv788
(Judge Munley)
Notice of Appeal

STATE OF NEW JERSEY, DEPT. OF TREASURY, DIVISIONS OF REVENUE and TAXATION,
Appellee

NOTICE OF APPEAL

Notice is hereby given that Rudolph Vegliante, Jr., Appellant in the above named case, hereby appeals to the United States Court of Appeals for the Third Circuit form the memorandum and Order entered in this action on the 14th day of September, 2001.

Dated: 10/3/01

Signed: Brett J. Riegel
Attorney for Appellant
Brett J. Riegel, Esq.
Amori & Riegel, LLC
717 Sarah Street
Stroudsburg, PA 18360
(570) 421-1260

NOT PRECEDENTIAL

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 01-3972

In Re:
Rudolph Vegliante, Jr.
Debtor

Rudolph Vegliante, Jr.
Appellant

v.

STATE OF NEW JERSEY, DEPARTMENT
OF TREASURY, DIVISION OF TAXATION

Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Civil No. 01-cv-00788)
District Judge: Honorable James M. Munley

Argued June 27, 2002

Before: AMBRO and STAPLETON, Circuit Judges
O'NEILL*, District Judge

(Filed: July 30, 2002)

---

*Honorable Thomas N. O'Neill, Senior Unites States District Court Judge for the Eastern District of Pennsylvania, sitting by designation.

Brett J. Riegel, Esquire (Argued)
Amori & Riegel
717 Sarah Street
Stroudsburg, PA 18360
Attorney for Appellant

David Samson
Attorney General of New Jersey
Patrick DeAlmeida
Deputy attorney General of
Counsel
Tracy E. Richardson (Argued)
Deputy Attorney General of New Jersey
Department of Treasury, Division
of Taxation
25 Market Street, P.O. Box 106
Trenton, NJ 08625
Attorneys for Appellee

Transcribed by: Geraldine C. Laws, CET

(Proceedings recorded by electronic

sound recording; transcript prepared by AAERT-certified transcriber.)

(The following bench opinion was delivered in open court:)

BENCH OPINION

AMBRO, Circuit Judge

(The following bench opinion was delivered in open court:)

THE HONORABLE JUDGE AMBRO: The Supreme Court stated in Seminole Tribe of Florida v. Florida, 517 U.S. 44, 72-73 (1996), that "the 11th Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction." In In Re: *Sacred Heart Hospital of Norristown*, 133 F.3d 237 (3d Cir. 1998) we observed that "since Seminole Tribe Section 5 of the 14th Amendment has been the sole basis for Congress to abrogate the States' immunity under the 11th Amendment." Id. at 242 (quoting College Savings Bank v. Florida Prepaid Post-Secondary Education Expense Board, 131 F.3d 353, 358 (3d Cir. 1997). We held in Sacred Heart that the bankruptcy clause is not a valid source of abrogation power. Sacred Heart, 133 F.3d at 243.

In this case, Vegliante asks us to allow him to pursue an adversary proceeding in bankruptcy against the State of New Jersey. The adversary proceeding at issue is plainly a suit within the meaning of the 11th Amendment. Missouri v. Fiske, 290 U.S. 18, 26 (1993) (quoting Cullens v. Virginia, 19 U.S. 264 (1821)). The State of New Jersey received a summons requiring it to appear in court or face a default judgment against is. That qualifies as a suit. See Id.

Vegliante seeks to prosecute a suit against the State of New Jersey without its consent. We cannot oblige that request in light of Sacred Heart's ruling on state sovereign immunity. Therefore, the District Court's order is affirmed.

TO THE CLERK:

Please file the foregoing Bench Opinion.

By the Court,

/s/ Thomas L. Ambro
Circuit Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 01-3972

In Re:

Rudolph Vegliante, Jr.
Debtor

Rudolph Vegliante, Jr.
Appellant

v.

STATE OF NEW JERSEY, DEPARTMENT
OF TREASURY, DIVISION OF TAXATION

Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Civil No. 01-cv-00788)
District Judge: Honorable James M. Munley

Argued June 27, 2002

Before: AMBRO and STAPLETON, Circuit Judges
O'NEILL*, District Judge

JUDGMENT

This cause came on to be heard on the record before the Middle District Court of Pennsylvania and was argued on June 2, 2002;

On consideration whereof,

IT IS NOW HERE ORDERED AND ADJUDGED by this Court that the judgment of the said District Court dated September 14, 2001, be, and the same is, hereby affirmed. Costs taxed against appellant. All of the above in accordance with the opinion of this Court.

ATTEST:
/s/
Acting Clerk

Dated: 7/30/02
Costs taxed in favor of Appellee, New Jersey Department of Treasury as follows:

Brief.....$111
Appendix.....$58
TOTAL.....$169

Certified as a true copy and issued in lieu of a formal mandated on August 21, 2002
Teste: /s/ Karen Brown
Acting **Clerk, U.S. Court of Appeals for the Third Circuit.**